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SEP 28 19
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 359

GREDE FOUNDRIES, INC., Iron Mountain Division,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

TO the Justices of the Supreme Court of the United States:

Grede Foundries, Inc., a corporation, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on May 2, 1951, enforcing an order of the National Labor Relations Board, dated April 27, 1949.

Opinions Below

The opinion of the Court below (A.R. 127)[1] is reported in 189 F. (2d) 258. The decision and order of the National Labor Relations Board appear at Pp. 38 through 41; and the findings, conclusions, and recommendations of the Trial Examiner, which were adopted by the Board, appear at Pp. 21 through 31 of the record printed for the Court below.

Jurisdiction

The judgment of the Court of Appeals was entered on May 2, 1951. The Honorable Harold H. Burton, on June 29, 1951, upon a petition, ordered that the time for filing petition for Writ of Certiorari be extended to and including September 29, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

(1) Whether the Regional Director of the National Labor Relations Board abused the discretion accorded him under the then-existing Rules and Regulations of the National Labor Relations Act and denied Petitioner an appropriate hearing by ordering a pre-hearing election where issues concerning the appropriate unit, the eligibility date, the name of the union to appear on the ballot, and the existence of a question concerning representation were raised during the preliminary investigation.

(2) Whether the Board's certification of representatives, issued on May 20, 1948, its decision and order

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[1] "A.R." refers to the printed additions to the record covering the proceedings in the Court below. "R" refers to the record printed for the use of the Court below.

issued on April 27, 1949, and the enforcement decree of the Court of Appeals are valid where the officers of the parent labor organization with which the affected union was affiliated did not sign their non-Communist affidavits until December 22, 1949.

(3) Whether the Board's determination of the appropriate unit and its certification of representatives, both issued after the effective date of the Labor-Management Relations Act, were valid where such determinations were based on a hearing conducted after the election, in disregard of Petitioner's request for a pre-election hearing, where Section 9(c)(1) of the Act specifically prohibits such a procedure.

(4) Whether the Board acted arbitrarily and capriciously in counting the ballot of an employee who had terminated his employment eight (8) months before the tally was made, and where the certification was based on a one-vote majority obtained in an election held eleven months prior to the date of certification.

Statutes Involved

The pertinent statutory provisions and rules and regulations, as issued by the National Labor Relations Board, are printed in Appendix A, infra Pp. 101-103.

Statement of the Case

This case involves the validity of a decree issued by the Court below, which enforced an order of the National Labor Relations Board, directing Petitioner to recognize and bargain with the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, UAW-CIO, as the exclusive

representative of certain of Petitioner's employees at its Iron Mountain Division plant.

Grede Foundries, Inc., your Petitioner, hereinafter referred to as the "Company," is a Wisconsin corporation, with its principal office and place of business in Milwaukee, Wisconsin. It operates a plant for the manufacture and sale of gray iron castings at Kingsford, Michigan (R. 23). During the period pertinent to these proceedings, the Company at this plant employed approximately seventy-seven (77) employees in the categories affected (R. 62).

On May 9, 1947, the United Automobile Workers CIO Competitive Shop Department, filed a petition with the Regional Office of the National Labor Relations Board, requesting that it be certified as the bargaining agent for "all production employees except for supervisory and clerical personnel" (R. 61, 98-99). In a letter dated May 26, Nielsen, a Field Examiner attached to the Board's Regional Office, forwarded to the Company certain consent election agreement forms and suggested that the Company get in touch with the Union representatives to agree, among other things, on the appropriate unit and the payroll date of eligibility (R. 176). In the telephone conversations and correspondence which followed, it became apparent that there were disputes concerning the appropriate unit, the eligibility date which would determine the voting register to be used in the election, the name of the union that would represent the employees, and the very existence of a question affecting representation (R. 142-143). The parties confirmed their different views in letters to the Regional Office dated May 29 and June 5, 1951. (R. 177-178, 178-179).

On June 5, Nielsen, the Field Examiner, wrote to Sabol, another Union representative, indicating clearly

that the Regional Office was considering a pre-hearing election, and stated that just as soon as certain information requested of the Company was received, "we will be able to decide what to do next and will let you know right away" (R. 163-164). Grede, the Company's president, in a letter dated June 11, 1947, submitted the requested information, restated its position with respect to the appropriate unit, and requested that a "formal hearing be held at which all questions involved can be argued" (R. 180-182).

Thereafter, in a letter dated June 17, 1947 (R. 165), the Regional Director, without making any attempt to reconcile the issues raised (R. 146-147), advised the Company that he would conduct an election on June 24, 1947. Grede, in a letter dated June 21, 1947 (R. 183), informed the Regional Director that he was surprised that the Board had not proceeded with a pre-election hearing, as requested, that the Company had not consented to the election, but that the Company nevertheless had posted the notices and was enclosing a payroll list as requested. The union which appeared on the ballot was the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO (R. 167), hereinafter referred to as the "International Union." The election notice forwarded by the Board, and posted by the Company, advised the employees that, "All production and maintenance employees of the Company at its Iron Mountain Division, exclusive of office and clerical employees, watchmen, and supervisory employees" (R. 167), were eligible to vote. At a pre-election conference, Nielsen, the Board's agent, on his own initiative, eliminated the names of two watchmen from the list of employees supplied by the Company (R. 162) at the election. Thirty-five (35) votes were cast for the Union,

thirty-three (33) against, and four (4) ballots were challenged (R. 63).

At the formal hearing, held on July 9, 1947, both the Company and the Union agreed that the watchmen should be included in the bargaining unit (R. 105); and as a result, no testimony was introduced as to the duties of the watchmen. The Company moved to set aside the election (R. 73).

Sabol, a Union official, testified that the International Union would establish a local union which would bargain for the employees (R. 108), and that the Competitive Shop Department, the original petitioning union, acted as the bargaining agent and is a labor organization (R. 108). Lee St. Arnauld, an employee Pattern Clerk, whose ballot had been challenged at the election, appeared as a witness for the Union (R. 113).

Under date of August 1, 1947, the Company forwarded a brief to the Board in support of its motion to set aside the election (R. 84-94).

In response to a telegraphic request on March 8, 1948, the Company informed the Board, among other things, that it still employed two watchmen, and that the Pattern Clerk job had been eliminated (R. 71).

In a motion dated March 17, 1948, the Company moved to dismiss the petition on the ground that "I. The lapse of time since the election is a bar to certification" and "II. The Board is without authority to certify the results of the election because of the Board's failure to comply with the procedural requirements of Section (9)(c)(1) of the Labor-Management Relations Act" (R. 64-70). Nevertheless, the Board, in a decision and direction dated April 8, 1948 (R. 72-81), determined the appropriate unit and

directed that three (3) of the challenged ballots, including that of St. Arnauld, the former Pattern Clerk, be counted. The Company, on April 12, 1948, informed the Regional Director that St. Arnauld had voluntarily terminated his employment with the Company on August 8, 1947 (R. 49).

Upon receipt of the Supplemental Tally of Ballots on April 22, showing thirty-six (36) votes for the Union and thirty-five (35) against (R. 95), the Company, on April 24, filed objections thereto on the ground, among other things, that the Board had improperly counted the ballot of Lee St. Arnauld (R. 82-84). The Board, on May 20, 1948, certified that the International Union had been designated and selected by a majority of the employees in the unit found appropriate in the Board's April 8 decision (R. 96).

Thereafter, the Union demanded of the Company that negotiations take place (R. 58), and the Company replied, declining to bargain, on the grounds that the certification was invalid and, "We do not believe that this union represents a majority of our employees" (R. 59).

The Union thereafter filed a charge with the Board, alleging that the Company had refused to bargain on June 9, 1948 (R. 14-15), pursuant to which a complaint was filed on December 7, 1948 (R. 16-18). The Company responded to the complaint, alleging that the certification was invalid and denying that the Union, on May 20, 1948, or thereafter, was the majority representative of the Company's employees (R. 19-20). The usual hearing was held on December 20, 1948; and on April 27, 1949, the Board rendered its decision and order based on the May 20, 1948 certification, directing the Company to recognize and bargain collectively with the International

Union as the exclusive representative of the employees (R. 38-41). The Company refused to comply with the order.

On July 31, 1950, the Board petitioned the United States Court of Appeals for the Sixth Circuit for a decree enforcing the order of the Board (R. 1-5). All the questions presented herein, except that relating to the validity of the Board's order and the Court's decree because of the failure of the officers of the National Union to file their non-Communist affidavits, were argued before the Court below. The Court of Appeals, on May 2, 1951, in a summary opinion, decreed enforcement of the Board's order (A.R. 187). On May 14, 1951, this Court, in *NLRB v. Highland Park Mfg. Co.*, 341 US 322, determined that the Board was without authority to issue a complaint or order based on a charge filed by a union whose parent affiliate was, at the time, not in compliance with the non-Communist affidavit requirements of the Act.

Under date of June 20, 1951, the Company moved the Court of Appeals to vacate its judgment of May 2, 1951, on the ground that the Board was without authority to issue its complaint and order, because of the fact that the National officers of the CIO had not filed their non-Communist affidavits until December 22, 1949 (A.R. 192 to 195). The Board filed a statement in opposition to the motion (A. R. 206 to 211), to which the Company filed a reply (A.R. 211 to 218). The Court of Appeals has not, as of the date of this petition, passed on Petitioner's motion to vacate the judgment of May 2, 1951. We will advise this Court of the disposition made of this motion by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Petitioner's Request for a Pre-Election Hearing

(1) The evidence shows that, during the preliminary investigation of the Union's petition for certification, the Company and the Union disagreed as to the appropriate bargaining unit and payroll to be used as a voting register in the election. There was also a question as to what labor organization would actually act as the bargaining agent and as to whether or not the Union had sufficient membership to raise a question affecting representation. The Company, under the circumstances, requested that a hearing be held to determine these issues before an election was conducted. Section 9(c) of the Wagner Act, infra Pp. 102, required an appropriate hearing, and the Board's Rules and Regulations, infra Pp. 103, required that the Regional Director recommend a formal hearing where there were substantial issues. The Regional Director, without making any attempt to resolve the pending issues, proceeded to order and conduct an election. The Company contended before the Board and the Court below that these were matters which had to be determined *before* an election could be conducted and that the Regional Director had exceeded the discretion accorded him under the then-existing Rules and Regulations of the Board and had denied the Company an appropriate hearing by ordering a pre-hearing election. It was pointed out that the result of the election could have been affected by the votes of the two watchmen who were eliminated by the Regional Director.

The decision of the Court below is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *NLRB v. S. W. Evan & Son,* 181 W. (2d) 427. The Court, in that case, held that a dispute concerning the eligibility date and the appropriate unit in-

volved substantial issues which required resolution by the Board prior to the hearing, and refused to enforce the Board's order to bargain on the ground that the employer, under the circumstances, was entitled to a pre-election hearing. The lower court's decision also appears to be in conflict with the opinion of this Court in *Pittsburgh Plate Glass Co. v. NLRB,* 313 US 146 that:

> "The Labor Act places upon the Board the responsibility of determining the appropriate group of employees for the bargaining unit." (P. 152) and that the " * * * Certification of the bargaining representative follows the determination of the appropriate unit." (P. 156)

The decision below also appears to be in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Marshall Field & Co. v. NLRB,* 135 F. (2d) 391, which held that:

> "The Board should have decided upon the unit or units appropriate for collective bargaining, before it called an election." (P. 393), citing the *Pittsburgh Plate Glass Co., supra.*

The Regional Director not only placed a union other than the petitioning union on the ballot, but disregarded the information he received concerning the establishment of a *local union* to represent the employees (R. 179).

The lower court's decision upholding the Regional Director's right to determine the name of the union which shall appear on the ballot appears in conflict with the decision of this Court in *May Dept. Stores v. NLRB,* 326 US 376, wherein it was held that:

> "The Board directs what names go on the ballot." (P. 381)

It would seem clear that the Board cannot determine the name of the union which shall appear on the ballot *after* the election has been held.

The Failure of the CIO to Qualify for the Use of the Board's Facilities

(2) Should the Court below deny Petitioner's motion to vacate the judgment of May 2, 1951, enforcing the order of the Board, it appears that such a denial would be in direct conflict with the decision of this Court in *NLRB v. Highland Park Mfg. Co.,* 341 US 322. It is clear that the complaint and order of the Board were issued prior to the time the officers of the Congress of Industrial Organizations, with which the Union was affiliated, executed their non-Communist affidavits, as required by Section 9(h) of the Act. See infra P. 101. Thus, the Board was without jurisdiction to institute these proceedings. Its order was invalid, leaving nothing for the Court below to enforce. This Court, in deciding the same issue presented in Petitioner's motion to vacate, stated:

> "The Board is a statutory agency and when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid." (*NLRB v. Highland Park Mfg. Co.,* 341 US 322, 71 S.Ct. 758, P. 761)

The Court of Appeals for the Fifth Circuit, in *Cathey Lumber Co. v. NLRB,* 189 F. (2d) 428, on rehearing, set aside its enforcement order on authority of this Court's decision in the *Highland Park* case, *supra.*

The Certification was Based on a Post-Election Hearing

(3) The Board's determination of the appropriate unit and the supplemental decision and certification were both

issued subsequent to the effective date of the Taft-Hartley Act. This action was in direct conflict of the provisions of Section 9(c)(1) of the amended Act (See P. 101), which specifically prohibits the post-election hearing procedure. Since the determination of the appropriate unit and the certification of representatives took place subsequent to the effective date of the Act, the Board's action does not come within the specific exceptions provided in Section 103 of the Labor-Management Relations Act (See infra P. 102). Counsel for the Petitioner has been unable to find, and the Board in the brief submitted to the Court below did not cite, any court decision which sustains the Board's right to issue a certification after the effective date of the amendments where such a certification is based on a pre-hearing election. This Court has held that:

> "The conclusive act of decision, in the investigation, is the certification. Until it is taken, what precedes is preliminary and tentative." (*Inland Empire District Council v. Millis,* 325 US 697, P. 707)

In the instant case, the conclusive act of the Board took place under the authority of the amended Act.

No Evidence of Union Majority on Date of Certification

(4) The Board, in its determination issued on April 8, 1948, directed that the challenged ballot of an employee who had terminated his employment eight (8) months before be counted under circumstances where it was likely that that ballot would be decisive in the election. The ballot was cast by an employee who appeared as a witness for the Union at the July 9 hearing. The final vote, including the questioned ballot, was thirty-six (36) for the Union and thirty-five (35) against (in an election held more than four years ago). In addition, the

Company had asserted in a motion to dismiss, filed with the Board on March 17, 1948, that there had been a turnover among the employees of approximately twenty-five per cent (25%), that the employer's management organization had been changed, that evidence of union activity among the employees was lacking, that there had been a substantial change among International and local Union officials, and that "a certification at this date would not represent the desires of the employees." The Board, nevertheless, eleven (11) months after the election, wherein the Union secured a dubious one-vote majority, certified that, as of May 20, 1948, the Union still represented a majority of the employees. It is submitted that a certification under these circumstances, approved by the court below, is in conflict with the statement by this Court that the Board, in certifying representatives,

> "* * * must act so as to give effect to the principle of majority rule set forth in Section 9(a), a rule that is sanctioned by our governmental practice, by business procedure, and by the whole philosophy of democratic institutions." (*NLRB v. Tower Co.*, 329 US 324, P. 331)

This is not a case where the employer asserts a loss of majority *following* the certification.

Importance of Issues

(5) It is respectfully submitted that the questions presented are of major importance to the administration of the National Labor Relations Act, the effectuation of the policies of Congress, and the protection of the right of employees freely to choose their bargaining representatives, as set forth in the said Act. The administration of our labor laws in a manner consistent with the express will of Congress is a matter of wide public interest and

will contribute to a lessening of litigation and to a greater acceptance on the part of employers and unions of the laws as written by the Congress. Further, the decision below is in direct conflict with the decisions of other courts of appeal, as well as of this Court.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

September 26, 1951.

Respectfully submitted,

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JACKSON M. BRUCE.
Counsel for Petitioner.

APPENDIX A

1. The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 141 et seq.), are as follows:

Sec. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 9(c)(4). Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

Sec. 9(h). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist party or affiliated with such party, and that he does not believe in, and is not

a member of or supports any organization that believes in, or teaches the overthrow of the United States Government, by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

2. The pertinent provision of the Labor-Management Relations Act of June 23, 1947, Ch. 120, 61 Stat. 136, is as follows:

Title I, Sec. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under Section 9 of the National Labor Relations Act prior to the effective date of this title until one year after date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

3. The pertinent provision of the National Labor Relations Act before amendment (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C., Secs. 151 et seq.), is as follows:

Sec. 9(c). Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

4. Rules and Regulations of the National Labor Relations Board, Series 4, in effect in June 1947:

Sec. 202.18. Formal hearing—If no informal adjustment of the question concerning representation has been effected, the Regional Director will recommend the formal procedures be taken. These may take the form of either (a) an immediate election followed by a hearing, if the case presents no issues of such substance to require final decision by the Board before a proper election may be held, or (b) a hearing followed by Board determination of the issues and, if appropriate, an election. * * *

Sec. 202.20. Procedure respecting elections conducted after hearing.—(a) If the preliminary investigation indicates that there are substantial issues which require Board determination before an appropriate election may be held, the Regional Director refers to the case of the Regional Attorney with the recommendation that a hearing on the issues be held.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 359

GREDE FOUNDRIES, INC., IRON MOUNTAIN DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 187) is reported at 189 F. 2d 258. The decision and order of the Board (R. 38-41) are reported at 83 NLRB 201. The decision and direction of the Board in the prior representation proceeding (R. 72-81) are reported at 76 NLRB 1246.

JURISDICTION

The judgment of the court below was entered on May 2, 1951 (R. 187). By order of Mr. Justice

Burton, dated June 29, 1951, the time for filing a petition for a writ of certiorari was extended to and including September 29, 1951 (R. 218). The petition for a writ of certiorari was filed on September 28, 1951. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as originally enacted (49 Stat. 449, 29 U. S. C., 151 *et seq.*), and as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV., 141 *et seq.*), and of the Rules and Regulations and the Statement of Procedure of the National Labor Relations Board, Series 4 (29 C. F. R., 1946 Supp., § 202.1, *et seq.*), are set forth in the Appendix to the petition, pp. 101-103, as supplemented by Appendix A of this brief, *infra,* pp. 17-23.

QUESTIONS PRESENTED

1. Whether the Board and the court below erred in holding that the regional director had not abused his discretion to order a prehearing election under the Wagner Act where the parties had raised no substantial issues requiring prior determination by the Board.

2. Whether the Board was required to treat as nullities the results of its election and hearing concluded prior to the Taft-Hartley Act and to

conduct a new hearing and election in accordance with the procedures under the amended Act before certifying a representative for petitioner's employees.

3. Whether the Board acted arbitrarily and capriciously in refusing to reject the otherwise valid ballot of an employee who had voted in the election because that employee left his job some two months after the election but before the final tally of the ballots.

4. Whether petitioner, having failed to raise before the Board or the court below, prior to the entry of a final decree and expiration of the time in which to seek rehearing, the contention that the Board's certification and order were invalid because the parent federation of the charging union had not filed non-Communist affidavits during the period the proceedings were pending before the Board, is entitled to review of this contention by this Court.

STATEMENT

This case arises out of petitioner's refusal to bargain with the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America (U.A.W.-C.I.O.), herein called the Union, following the Board's certification of the Union as the exclusive representative of petitioner's employees at its Kingsford, Michigan, plant. The facts may be summarized as follows:

A. *The proceedings before the Board*

On May 9, 1947, the Union initiated representation proceedings before the Board by filing a petition for certification of representatives (R. 72; 61-62). In accordance with the Board's usual procedure, the regional director conducted a preliminary investigation to ascertain the positions of the parties. Concluding that no serious dispute existed as to the scope of the unit, the regional director, on June 17, 1947, directed that a prehearing election be held on June 24, as provided for in the Board's Rules and Regulations and Statement of Procedure then in effect (R. 72; 165-166; Pet. p. 103; *infra,* p. 21). In a letter accompanying the notice of election, he advised petitioner that the election was "of course, without prejudice to your right to hearing * * * before final determination of the question concerning representation" (R. 165).

At the election, in conformity with the regional director's tentative unit description,[1] the Board's

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[1] In the notice of election, the voting unit was described as "all production and maintenance employees," excluding "office and clerical employees, watchmen, and supervisory employees" (R. 167). This description accorded substantially with the expressed position of petitioner, in that it excluded watchmen, clerical, and supervisory employees (R. 177). Although petitioner had also desired to exclude janitors, timekeepers, shop clerks, stock clerks and supervisory inspectors, there were no employees then working in such distinct job categories (R. 76; 155-159, 177, 182, 185-186). In addition, petitioner had originally urged that a shipping clerk and a maintenance employee be excluded from the unit, but petitioner apparently

field examiner excluded the watchmen employed by petitioner from the list of eligible voters. No objection to this ruling was then raised by either petitioner, the Union, or the employees themselves (R. 89, 105-106, 169, 181). The Union challenged the eligibility to vote of two employees, and petitioner challenged St. Arnauld, a pattern storage clerk, and another employee (R. 79; 113, 124, 152, 161-162). When the tally of ballots showed that of 72 employees who had voted, 35 had cast their ballots for the Union and 33 against (R. 73; 62-63), it became necessary to determine the validity of the four challenged ballots to decide the outcome of the election.

On July 9, 1947, a post-election hearing was held "for the express purpose of affording to the parties an opportunity to state their views with respect to any issues between them, and to supply the evidence necessary for resolution by the Board of all such issues" (R. 73). At the hearing petitioner, for the first time, contended that the watchmen should have been included in the unit and permitted to vote (R. 105, 181). In addition, petitioner introduced evidence on all issues which it then considered relevant, and upon conclusion of the hearing the case was referred to the Board for decision.

Subsequent to the hearing, and before issuance

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abandoned this contention at the time of the election, since it did not challenge the ballot of either employee (R. 75-76; 149, 152, 161, 162, 177).

of the Board's decision, petitioner on March 10, 1948, advised the Board that St. Arnauld had resigned in August 1947, and that although the total number of employees had remained fairly constant, there had been a personnel turnover of approximately 25 percent since the election (R. 77; 71-72, 65). Shortly thereafter, petitioner moved that the Board dismiss the petition on the grounds that (1) the intervening effective date of the amendments to the Act rendered the holding of the prehearing election unlawful and (2) because of the lapse of time since the election "a certification at this late date would not represent the desires of the employees" (R. 65). On April 8, 1948, the Board issued its decision and direction (R. 72-81), finding that the appropriate bargaining unit was substantially the same as that described by the regional director and concluding that the contentions raised by petitioner did not warrant vacating the proceedings. The Board also found that three of the four employees whose ballots had been challenged, including St. Arnauld, were eligible to vote, and directed that their ballots be opened and counted (R. 79-81). The final tally of ballots, including those three, showed that of a total of 71 valid ballots, 36 were cast for, and 35 against, the Union (R. 95). Accordingly, on May 20, 1948, the Board, in a supplemental decision and certification, certified the Union as the exclusive representative of petitioner's employees (R. 95-96).

Following the issuance of the certification the Union requested petitioner to bargain with it and petitioner refused (R. 25-26; 58-59). Thereafter, the usual proceedings under Section 10 of the Act were instituted, at the conclusion of which the Board found that petitioner had violated Section 8 (a) (1) and (5) of the Act by its refusal to bargain (R. 38; 14-31, 42). Accordingly, petitioner was ordered to cease and desist from engaging in further similar unfair labor practices and to bargain with the Union on request (R. 39-40).

B. *Proceedings in the court below*

Petitioner having failed to comply with the Board's order, the Board, on July 31, 1950, instituted in the court below the usual enforcement proceedings under Section 10 (e) of the Act (R. 1-5). On May 2, 1951, the court issued a *per curiam* opinion and entered a judgment enforcing the Board's order in full (R. 187).

On June 20, 1951, after expiration of the time in which to petition for rehearing, petitioner filed in the court below a motion for vacation of the court's judgment (R. 192-195). Posing issues which had never theretofore been presented either to the Board or to the court (Pet. 8, R. 194), petitioner asserted in support of its motion to vacate that the Board's order was invalid because the officers of the C.I.O. had not filed the non-Communist affidavits required by Section 9 (h) of the Act until

after the Board's certification and complaint were issued (R. 193-194). This motion, which presents the question whether the court below was "without jurisdiction to enforce an invalid order of the * * * Board" (R. 195), is still pending.

ARGUMENT

1. Petitioner's contention (Pet. 2, 9-11) that the regional director abused his discretion in applying the Board's Rules and Regulations under the Wagner Act by conducting a prehearing election in the circumstances of this case is neither important nor meritorious. As petitioner insists (Pet. 12),[2] the prehearing election procedure no longer exists under the amended Act, so that questions of the scope of a regional director's discretion to employ this procedure under the original Act are of no general significance today. But even apart from this consideration and apart from the fact that the decision below is clearly correct,[3] there would be no warrant for review of the question whether the regional director properly exercised

[2] See National Labor Relations Board Thirteenth Annual Report, p. 20 (1948).

[3] The Board's Statement of Procedure (*infra*, p. 21), upon which petitioner relies in attacking the regional director's decision to conduct a prehearing election, did not require that the parties be in full accord before such an election could be held, but only that there be "no issues *of such substance to require final decision by the Board* before a proper election may be held". (Emphasis added.) Without unnecessarily extending this discussion by detailing the character of the "issues" which petitioner merely states to support its position (Pet. 9), we submit that the record fully sustains the regional director, the Board, and the court below in the conclusion that these issues were insubstantial.

his discretion in concluding that no substantial issue precluded his direction of the election prior to the hearing. For it is clear that appraisal of the propriety of the regional director's action turns on the circumstances of this particular case and that review by this Court of this factual inquiry, following the concurrent determinations of the Board and the court below, would be inappropriate.

It is equally clear that the essentially factual holding of the court below presents no conflict with any other decision. As we show in the note below,[4]

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[4] *National Labor Relations Board* v. *Evans & Son*, 181 F. 2d 427 (C. A. 3), merely held, on the facts there presented, that a regional director had abused his discretion in ordering a prehearing election—a holding in no way inconsistent with the view that, on the facts of *this* case, there was no such abuse. Petitioner's reference (Pet. 10) to *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, is even wider of the mark; there is no doubt here that, as it pointed out in its decision (R. 73), the Board exercised its "responsibility of determining the appropriate group of employees for the bargaining unit" (313 U. S., at 152) and that "Certification of the bargaining representative follow[ed] the determination of the appropriate unit" (*id.*, at 156). *Marshall Field & Co.* v. *National Labor Relations Board*, 135 F. 2d 391 (C. A. 7), which held—with Judge (now Mr. Justice) Minton dissenting—that "The Board should have decided upon the unit * * * before it called an election" (135 F. 2d, at 393) scarcely advances petitioner's attack upon the prehearing election in this case in view of this Court's subsequent ruling that "nothing in [Section 9] purports to require a hearing before an election." *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 707. This same ruling demonstrates, finally, the futility of petitioner's reliance upon the statement in *May Dept. Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 381, that "The Board directs what names go on the ballot." Having conceded (R. 90), as it had to, that the prehearing election procedure was permissible under the original Act, petitioner is left with no basis for its attempt

the decisions petitioner cites as conflicting are either wholly consistent with, or irrelevant to, the decision below.

2. Applying settled and plainly apposite principles of construction, the courts of appeals have consistently rejected suggestions that the amendments effected by the Taft-Hartley Act were intended to nullify procedural steps completed by the Board under the Wagner Act prior to the effective date of Taft-Hartley.[5] The numerous and uniform contrary decisions demonstrate the baselessness of petitioner's contention (which, like the one discussed above, is no longer of material im-

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to suggest that the procedure was actually improper in every case because it omitted pre-election directions by "the Board" as to "what names go on the ballot."

[5] *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co.*, 185 F. 2d 285 (C. A. 2), certiorari denied, October 8, 1951; *National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 18 (C. A. 2); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. A. 2); *National Labor Relations Board* v. *Brozen*, 166 F. 2d 812, 813 (C. A. 2); *National Labor Relations Board* v. *Clark*, 176 F. 2d 341, 343 (C. A. 3); *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749, 754 (C. A. 4); *National Labor Relations Board* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506-507 (C. A. 5); *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board* v. *Carolina Mills*, 167 F. 2d 212, 214 (C. A. 5); *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485 (C. A. 6); *National Labor Relations Board* v. *Whittenberg*, 165 F. 2d 102, 104 (C. A. 5); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 236-238 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71-72 (C. A. 10). See also, Sutherland, *Statutory Construction*, Vol. 1, Section 1935, n. 13, p. 434 (3d ed., 1943). Compare Section 12 of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1011, and Rule 86, Federal Rules of Civil Procedure.

portance in the administration of the Act) that the Board should have scrapped the results of its election and hearing concluded prior to Taft-Hartley and should have conducted a new hearing and election under the procedures of the amended Act before certifying a representative for petitioner's employees.

3. Equally without merit is petitioner's argument (Pet. 3, 12-13) that the Board acted arbitrarily and capriciously in counting the ballot of an employee who left petitioner's employ about two months after the election but eight months before the tally was made. As this Court pointed out in *National Labor Relations Board* v. *Tower Co.*, 329 U. S. 324, 331, practical implementation of the "principle of majority rule" requires that the eligibility of voters be determined at or before the time of an election. To hold that a valid ballot cast by an eligible employee must be discarded because the employee subsequently terminates his employment would require "the holding of constant and repeated elections [which] is quite impracticable." *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 221 (C. A. 4). And so the courts, recognizing that "the certification reports the will of the majority as of the day of the election but * * * necessarily does not issue until * * * perhaps weeks or months later" (*ibid.*), have repeatedly held that the votes of employees who leave their jobs be-

tween election and certification may properly be counted in determining a majority representative.[6] Petitioner suggests no ground for applying a contrary, wholly unworkable rule to this case.[7]

Nor is petitioner's position strengthened by the suggestion (advanced in argument, Pet. 12-13, though not posed as a question presented) that the Board should have considered its election void because there had been a turnover of some 25 percent among petitioner's employees between the time of the election and the certification. This variant of the argument respecting the single employee who left his job after the election is clearly erroneous for the reasons we have already stated. Indeed, since petitioner has not shown that the changes in its personnel effected a change in the proportion favoring representation by the Union, its contention amounts to nothing more than a clearly unfounded claim that the Board's pro-

[6] See *National Labor Relations Board* v. *Calumet Steel*, 121 F. 2d 366, 370 (C.A. 7); *National Labor Relations Board* v. *Worcester Woolen Mills*, 170 F. 2d 13, 17 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 758-759 (C. A. 4).

[7] While it mentions in its argument (Pet. 12) the fact that it unsuccessfully challenged the ballot of the employee whose subsequent termination of his employment it now invokes to attack the Board's certification, petitioner neither does nor could argue that this challenge would warrant departure from the rule that a valid ballot of an eligible employee is not invalidated by the employee's change of status after the election. Having abandoned its contention that the challenged ballot was improper at the time of the election, petitioner has no basis for arguing that this ballot should be treated differently from any other for any purpose.

cesses must regularly be nullified by the normal circumstance of employee turnover.[8]

4. Petitioner's remaining contention—that the Board's order should not have been enforced because the certification and the complaint were issued before execution of non-Communist affidavits by the officers of the C.I.O. (Pet. 11)—was, as petitioner acknowledges (Pet. 8), never raised before the Board or before the court below until after entry of the court's decree and expiration of the time in which to seek rehearing. Although petitioner has filed with the court below a motion to vacate its judgment, it is clear that this belated effort does not affect the finality of that judgment[9] and the ap-

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[8] See *National Labor Relations Board* v. *Worcester Woolen Mills, supra,* at 17; *National Labor Relations Board* v. *National Plastic Products Co., supra,* at 759; *International Assn. of Machinists* v. *National Labor Relations Board,* 110 F. 2d 29, 33 (C. A. D. C.), affirmed, 311 U. S. 72; *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. 2d 632, 640 (C. A. 4); *National Labor Relations Board* v. *Grieder Machine Tool & Die Co.,* 142 F. 2d 163, 165 (C. A. 6), certiorari denied, 323 U. S. 724; *National Labor Relations Board* v. *Botany Worsted Mills,* 133 F. 2d 876, 881 (C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Appalachian Electric Power Co.,* 140 F. 2d 217, 220-222 (C. A. 4); *Valley Mould & Iron Corp.* v. *National Labor Relations Board,* 116 F. 2d 760, 764-765 (C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *Century Oxford Mfg. Corp.,* 140 F. 2d 541, 542-543 (C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Blair Quarries, Inc.,* 152 F. 2d 25, 26 (C. A. 4); see also, *National Labor Relations Board* v. *Geraldine Novelty Co.,* 173 F. 2d 14, 16-18 (C. A. 2).

[9] The filing of a motion to vacate the decree does not affect its finality, for ". . . finality is not deferred by the existence of a latent power in the rendering court to reopen or

plicability here of the rule that certiorari will not be granted to review a question "not properly raised, litigated or passed upon below." *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328. See also *Marshall Field & Co.* v. *National Labor Relations Board* 318 U. S. 253; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385. For the motion to vacate necessarily raises a new, narrower issue, the lower court's resolution of which may itself afford a basis for seeking review by this Court. Cf. *Swift & Co.* v. *United States,* 276 U. S. 311.[10] It does not cure retroactively petitioner's failure to present to the Board or the court below the question it now poses in its application for review of the present judgment.

In any event, this question is completely disposed of by a recent amendment to the National Labor Act, approved October 22, 1951. See Appendix B, *infra,* pp. 23-25.[11] In this amendment, Congress provided that certifications issued while the C.I.O.

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revise its judgment." *Market St. Ry. Co.* v. *Railroad Commission of California,* 324 U. S. 548, 551.

[10] Obviously petitioner cannot succeed in its motion below merely by showing that the question it failed to raise before judgment is one on which it could have prevailed. For the motion to vacate can serve in a case of this kind, not as a rescue device for reviving issues closed by a final decree, but only as a means of securing relief from a judgment which exceeded "the power of the court to adjudicate between the parties." *Swift & Co.* v. *United States, supra,* at 327.

[11] The amendment was passed by the Congress on October 9, 1951 (97 Daily Cong. Rec. 13122-13127), and signed by the President on October 22, 1951 (Pub. Law 189, October 22, 1951, 82nd Cong., 1st Sess.).

was not in compliance with Section 9 (f), (g), and (h), should not be deemed invalid. After stating in a proviso that persons who failed to honor such certifications should not be held liable therefor, Congress added a further proviso (*infra*, p. 24) declaring that this exemption should not apply in cases where liability had already been imposed by final court decree. Congress thereby precluded efforts like petitioner's to have the courts "excuse disobedience to court judgments and court decrees which became final prior to the date" of the enactment of the amendment.[12]

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[12] H. Rep. No. 1082, 82nd Cong., 1st Session., p. 2; see also, S. Rep. No. 646, 82nd Cong., 1st Sess., p. 2.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1951.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, 141 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also, have the right to refrain from any or all of such activities * * * .

UNFAIR LABOR PRACTICES

SEC. 8. (a) *It shall be an unfair labor practice for an employer*—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * * (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a). * * *.

REPRESENTATIVES AND ELECTIONS

SEC. 9. (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not * * * (3) decide that any

unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; * * *

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(b) Whenever it is charged that any person

has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency at a place therein fixed, not less than five days after the serving of said complaint:* * *
Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 732-B, 723-C).

(c) The testimony taken by such members, agent or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleading and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleading, testimony, and proceedings set forth in such transcript a decree of enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

2. The relevant provisions of the National Labor Relations Act before amendment (Act of July 5,

1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.
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> * * * * *

Rules and regulations of the National Labor Relations Board, series 4 (29 C. F. R., 1946 Supp., § 202.1 *et seq.*):

> SEC. 203.49 *Investigation of petition by Regional Director; notice of hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if no agreement such as that provided in section 203.48 is entered into and if it appears to the Regional Director that the policies of the act will be effectuated and that (if the petiton is filed by a labor organization), there is reasonable probability that an investigation will result in a free choice by employees of a bona fide representative, he shall institute such investigation: * * *.[1]
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> STATEMENT OF PROCEDURE
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> SEC. 202.18 *Formal hearing.*—If no informal adjustment of the question concerning

[1] At any stage of the investigation, either before hearing or after the hearing but before transfer of the case to Board, the Regional Director may in cases which present no substantial issues, conduct a secret ballot of the employees, or he may decline to continue the investigation.

representation has been effected, the Regional Director will recommend that formal procedures be taken. These may take the form of either (a) an immediate election followed by a hearing, if the case presents no issues of such substance as to require final decision by the Board before a proper election may be held, or (b) a hearing followed by Board determination of the issues and, if appropriate, an election. * * *

SEC. 202.19 *Procedures respecting elections conducted before hearing.*—(a) If the Regional Office determines that the case is an appropriate one for election before formal hearing, an election is conducted as quickly as possible among the employees, the rights of all parties, however, being preserved by opportunity for appropriate challenges and objections to the conduct of the election, and for full hearing after the election. If the election shows that a representative has been selected and no objections are filed by any party, the employer may recognize such representative by entering into a recognition agreement or a stipulation for Board certification after election. Both of these forms are available upon request to the Regional Offices. If objections are filed or if for any other reason the employer does not choose to terminate the case by either of the above informal adjustments, the Regional Director will issue a notice of hearing. At this hearing, conducted before a hearing officer who is usually an attorney or field examiner attached to the Regional Office

but who may also be another qualified official, all issues, including issues with respect to the conduct of the election and challenged ballots, are fully heard. Following the hearing, the hearing officer submits an informal analysis to the Board.

* * * * *

APPENDIX B

Public Law 189, 82d Cong., 1st Sess., October 22, 1951, provides as follows:

AN ACT

To amend the National Labor Relations Act, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the National Labor Relations Act, as amended, is hereby further amended as follows:

(a) By adding at the end of said Act the following new section:

"SEC. 18. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9 (f) (g), or (h) of the aforesaid

Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9 (f), (g), or (h) of the aforesaid Act prior to November 7, 1947: *Provided,* That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: *Provided, however,* That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10 (e) or (f) and which have become final."

(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads " ; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the author-

ity of such labor organization to make such an agreement:"

(c) Section 9 (e) of such Act is amended by striking out all of subsections (1) and (2) and inserting in lieu thereof the following: "(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer." Renumber subsection "(3)" as "(2)".

(d) Subsections (f), (g), and (h), of section 9 of such Act are amended by striking out the words "No petition under section 9 (e) (1) shall be entertained," where they appear in each of such subsections.

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COPY ROBERTSON AND HOEBRECKX

November 7, 1951

No. 353

Office-Supreme Court, U. S.
FILED
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CHARLES

Mr. John W. Menzies, Esq.
Clerk, United States Court of Appeals
for the Sixth Circuit
Cincinnati 2, Ohio

Dear Sir:

Re: National Labor Relations Board v. Grede Foundries, Inc.
No. 11,218

The undersigned has received a copy of a letter addressed to you, dated October 30, 1951, from the Assistant General Counsel of the National Labor Relations Board, asserting that the recently passed amendment to the National Labor Relations Act requires that Respondent's motion to vacate, now pending before the Court, be dismissed. Respondent contests this assertion.

Under date of June 26, Respondent filed with the Clerk of the United States Supreme Court, a petition for extension of time to file a petition for a writ of certiorari in this matter; and the Hon. Harold H. Burton, Associate Justice of the Supreme Court of the United States, on June 29, 1951, by order extended the time to September 29, 1951.

Under date of September 26, 1951, Respondent herein filed a petition for writ of certiorari with the Supreme Court of the United States, requesting that Court to review this Court's judgment of May 12, 1951, and also the issue raised in Respondent's motion to vacate.

Respondent's motion to vacate was based upon the assertion that the Board's order and this Court's judgment were invalid because, at the time the complaint was issued, the national officers of the CIO were not in compliance with the non-Communist affidavit requirements of the Act. Congress, in the October 22, 1951 amendment, did not change the prohibition against the issuance of complaints based on charges filed by labor organizations which had failed to file non-Communist affidavits. Section 18 of the amendment legalized certain previous acts the Board had taken in connection with representation cases, and referred to unfair labor practice cases only in the two provisos contained therein.

These provisos are as follows:

"Provided, That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment; Provided, however, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10(e) or (f) and which have become final." (Emphasis ours)

Clearly, under the first proviso, this Court would have no alternative but to grant Respondent's motion to dismiss. The issue here presented is whether the judgment of this Court is one which became final prior to October 22, 1951, the day on which the amendment became effective.

The case cited by the Board in its letter of October 30--Market Street Railway Co. v. Railway Commission of Calif., 324 US 518, 551--is not in point. The issue therewas: When did a state court's judgment become "final" for purposes of review by the United States Supreme Court. (See Headnote 2, P. 548).

"The judgment for ourpurposes is final when the issues are adjudged." (P. 551) (Emphasis ours)

The Court, however, did indicate clearly that a judgment is not final if it is subject to further review. The Court stated that a judgment, to be final, "must be the final word of a final court." A Circuit Court of Appeals is not a "final court" in the Federal Judicial system.

Section 18 of the amendment prohibits the setting aside of judgments "which have become final." If the Congress intended that every judgment rendered by a Circuit Court under Sections 10(e) or 10(f) was to remain undisturbed, regardless of whether or not an appeal therefrom was pending, the language "and whihh have become final" would have been omitted. The judgment of a Circuit Court of Appeals which, prior to the effective date of the Act, was made the subject of a timely petition for a writ of certiorari does not become final until the Supreme Court of the United States acts upon the petition. The Congress, by instituting the additional language, anticipated the situation here involved.

Section 10(e) of the National Labor Relations Act provides in part as follows:

"...The jurisdiction of the court shall be conclusive and its judgment and decree shall be final, except that the same shall be subject to review....by the Supreme Court of the United States upon writ of certiorari or certification..."

Thus, the Act specifically provides that the exception to the finality of a Circuit Court's judgment arises in a case where the judgment is made subject to review by the United States Supreme Court in a petition for a writ of certiorari.

It is, therefore, submitted that the second proviso of Section 18 has no application in the instant case, and that the first proviso of Section 18 requires that Respondent's motion to vacate this Court's judgment be granted.

It will be greatly appreciated if you will submit this letter to the Court at the same time you submit the Board's letter of October 30, 1951.

Respectfully yours,

ROBERTSON AND HOEBRECKX

By
O. S. Hoebreckx, Counsel for
Grede Foundries, Inc.

OSH/gll
cc: Mr. A. Norman Somers
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.